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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

GE AMERICAN COMMUNICATIONS, INC. REPLY TO COMMENTS ON PETITION FOR CLARIFICATION OR RECONSIDERATION

GE American Communications, Inc. ("GE Americom"), by its attorneys, hereby submits its reply to other parties' comments on its Petition for Clarification or Reconsideration of the *Report and Order* in this proceeding. 1/

First of all, no party has refuted GE Americom's showing that the provision of bare transponder space segment does not constitute the provision of "telecommunications" under the Act. The few comments on our reconsideration petition go to the separate question of whether the Commission correctly limited the contribution obligation of satellite providers to situations in which they provide common carrier "telecommunications services." These parties summarily argue that non-common carrier satellite "telecommunications" also should contribute.

1/ Report and Order, CC Docket No. 96-45, FCC 97-157 (released May 8, 1997) ("*Report and Order*" or "*Order*").

However, they provide no analysis for these assertions, let alone recognize the particular circumstances of satellite services.

Second, no commenter demonstrates any reasonable basis for the Commission to reverse its holding that providers of telecommunications service or telecommunications under contract will be allowed to recover contribution obligations from their customers. The Commission should reiterate its holding and clarify that state contract law is not preempted except to the extent necessary to permit such recovery.

I. THE COMMISSION SHOULD REAFFIRM THAT ONLY COMMON CARRIER SATELLITE SERVICES SHOULD CONTRIBUTE TO UNIVERSAL SERVICE.

None of the opposing parties refuted the arguments of GE Americom and other satellite operators that: (1) the Commission should confirm and clarify its apparent holding that "satellite and video service providers must contribute to universal service only to the extent that they are providing interstate telecommunications services[,]" and not to the extent that they provide direct broadcast satellite ("DBS") and other non-common carrier services; 2/ and (2) Section 254(d) does not authorize the imposition of universal service support obligations on the provision of access to satellite transponders (*i.e.*, bare space

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2/ *Report and Order*, ¶ 781.

segment), which does not constitute a form of "telecommunications" under the Act. 3/

A. Non-Telecommunications Satellite Activity.

In its Petition GE Americom demonstrated that. as a legal matter, the offering of satellite transponder capacity does not constitute "telecommunications" under the Act and so cannot be subject to contribution obligations. The party using the transponder -- which is nothing more than a repeater that happens to be located over 22,000 miles above the equator -- is the party that actually engages in telecommunications, including: (1) creating a transmission path of its own design; (2) managing that transmission path; and (3) distributing information over that path. In these circumstances, the satellite operator is not a "provider of telecommunications."

The offering of transponder capacity is closely analogous to telecommunications equipment leases and network construction contracts, which enable customers to provide telecommunications for themselves or for others but do not themselves constitute a telecommunications offering. Other offerors of telecommunications network components, such as equipment vendors and fiber cable developers, are not required to contribute, and satellite transponders should not either.

3/ GE Americom Petition, *passim*; *see also* Loral Comments at 4-13; PanAmSat Comments at 2-8; 47 U.S.C. §§ 3(43), 254(d).

The comments of other satellite companies strongly support GE Americom on this point, and no other party disagrees that such non-telecommunications operations are outside the scope of Section 254. 4/ The Commission should make clear that, in this context, "telecommunications" occurs only when a party transmits, not when a party provides a device that a third party uses to transmit.

B. Non-Common Carrier Satellite Telecommunications.

Alone among the commenters, AT&T, Bell Atlantic, and MCI glibly and briefly note the separate question of non-common carrier satellite telecommunications. 5/ However, they do not address the special circumstances of these offerings, and instead simply treat satellite companies as part of a "parade of telecommunications service providers" 6/ requesting exemptions from the universal service contribution obligations. These commenters do not engage with the specific arguments made by the satellite industry. Indeed, the misstatements in these parties' filings betray that they do not understand the relevant facts. For example,

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4/ The only party even tangentially addressing this point is AT&T, which -- contrary to the well-reasoned approach in the Report and Order -- attempts to characterize satellite operators' non-common carrier transponder offerings as "telecommunications service." AT&T Comments at 23; *compare Report and Order*, ¶¶ 785-86.

5/ AT&T Comments at 23; Bell Atlantic Comments at 8-9; MCI Comments at 17.

6/ Bell Atlantic Comments at 8.

AT&T cites a 1996 order and asserts that "the Commission only recently accorded domestic satellite operators the discretion to elect to operate on a noncommon carrier basis . . . [,]" 7/ even though the Commission has allowed satellite operators to operate on a non-common carrier basis for 15 years. 8/ All three of these parties carelessly refer to satellite operators as "telecommunications carriers" or providers of "telecommunications service," even though common carriage represents only a small part of GE Americom's and many other satellite operators' business activities. 9/

MCI's arguments actually support GE Americom's position that satellite operators' non-common carrier services should not be subject to universal service contribution obligations. MCI notes, "The Act . . . requires that all telecommunications carriers providing interstate telecommunications services contribute to the fund." 10/ We agree, and have consistently taken this position; our arguments relate to non-common carrier satellite operations. MCI also contends that "equity requires that entities that benefit from universal service also

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7/ AT&T Comments at 23.

8/ *Domestic Fixed Transponder Sales*, 90 FCC 2d 1238 (1982), *aff'd sub nom. Wold Communications, Inc. v. FCC*, 735 F.2d 1435 (D.C. Cir. 1984).

9/ *See Report and Order*, ¶¶ 785-86 (concluding that statutory definition of "telecommunications service" means telecommunications provided on a common carrier basis).

10/ MCI Comments at 17.

should contribute to its maintenance." Again, we agree. But under the same equity rationale, entities such as satellite operators that have nothing to do with universal service -- that for the most part are neither connected to the public switched telephone network, nor provide common carrier services or services that compete with common carrier services 11/ -- should not be required to contribute.

II. PROVIDERS OF TELECOMMUNICATIONS UNDER CONTRACT MUST BE ALLOWED TO RECOVER CONTRIBUTION OBLIGATIONS FROM THEIR CUSTOMERS.

The Commission should affirm and clarify its holding that "universal service contributions constitute a sufficient public interest rationale to justify contract adjustments." 12/ Both common carriers and non-common carriers, to the extent they are required to contribute, must be allowed to recover the costs of those contributions from their customers. This is particularly important for the unique satellite industry, in which most space segment capacity is committed under very long term contracts, typically for the life of the satellite, and there is often no recourse for recovering additional costs without reopening contracts.

11/ Loral points out that satellite operations are typically devoted to large bandwidth applications, such as large data transfers and video transmissions, that neither use nor compete with PSTN operations. Loral Comments at 4-5.

12/ *Report and Order*, ¶ 851.

It is critically important, as CTIA and BellSouth point out, that the Commission clarify the last sentence of paragraph 851 of the *Report and Order*. 13/ Specifically, the Commission should confirm that state contract law is not preempted except to the limited extent necessary to permit universal service costs to be recovered from customers. 14/ The Commission cannot have meant to wipe out the holding of the rest of paragraph with a single stray sentence.

The Commission should reject API's arguments on this issue. 15/ These arguments are particularly absurd in the context of satellite operators. 16/ API disputes the Commission's finding that the cost of universal service contributions is "an expense or cost of doing business that was not anticipated at the time contracts were signed[,]" 17/ contending that "[a]ll carriers and providers of interstate telecommunications services have been on notice since at least

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13/ "We clarify, however, that this finding is not intended to preempt state contract laws." *Id.*

14/ CTIA Petition at 23-24; BellSouth Comments at 8-9.

15/ API Comments at 2-8.

16/ For example, API contends that it would be unfair to allow carriers to reopen contracts to flow through universal service cost increases without also requiring them to flow through cost reductions attributable to reduced access charges. API Comments at 4-5. But this access-related rate reduction is irrelevant to satellite operators, which are not interconnected with the PSTN and do not use incumbent local exchange carriers' access services.

17/ *Report and Order*, ¶ 851.

February 1996 that they would be subject to such assessments." 18/ But non-common carriers such as satellite operators that historically have never been required to contribute to universal service had no such notice before the May 1997 *Report and Order*, which reversed the Joint Board's recommendation in this respect.

Moreover, there is no merit to API's contention that Section 254(d) imposes the burden of universal service contributions upon carriers rather than end users. 19/ API does not explain where telecommunications providers are supposed to get money to pay for universal service other than from revenues from their customers. The imposition of universal service obligations on telecommunications providers is, and indeed must be, equivalent to the imposition of this burden on telecommunications customers. In this regard, API's contention that the "takings" clause of the Fifth Amendment does not guarantee an 11.25% rate of return 20/ does nothing to refute GE Americom's argument that for the Commission to impose a contribution obligation, without affording an opportunity for parties subject to that obligation to recover the cost from their customers, would constitute an unconstitutional "taking." 21/

18/ API Comments at 2-3 (emphasis omitted).

19/ API Comments at 5-6.

20/ API Comments at 6-7.

21/ GE Americom Comments at 7-8.

Finally, the Commission should reject API's claim that an individual, fact-based investigation for each carrier and telecommunications provider would be necessary to establish "substantial cause" for contract modifications. 22/ While such investigations may be necessary in other contexts, here such individual investigations would constitute an unnecessary, burdensome waste of time. The issue is identical for each telecommunications provider subject to universal service obligations. The Commission's "substantial cause" finding in paragraph 851 amply supports reopening of contracts pursuant to the *Mobile-Sierra* doctrine.

CONCLUSION

In conclusion, the Commission should affirm that satellite operators are required to contribute to the extent that they provide telecommunications service, but not otherwise; that making available bare space segment capacity on satellite transponders cannot be subject to universal service obligations because it

22/ API Comments at 7-8.

does not constitute "telecommunications;" and that universal service contributors may reopen long-term contracts to recover the new cost of doing business from their customers.

Respectfully submitted,

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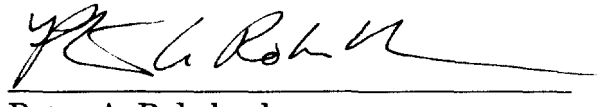
By: 

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Dated: September 3, 1997

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